Public Prosecutor v Sim Kay Chay

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 42–11 OF 2007-II
HAMID SULTAN JC
29 JUNE 2007

Evidence — Deposition — Absent witness — Witness whose deposition was recorded had been deported back to her country — Whether prosecution made out a prima facie case against accused

Evidence — Deposition — Absent witness — Recorded by magistrate — The only evidence against accused — Admissibility — Whether deposition evidence admissible — No order for removal from Malaysia made by Director General of Immigration — Immigration Act 1959/1963 (Act 155), ss 32, 33 & 56(2) and Evidence Act 1950, ss 32 (i) & (j)

Immigration Law — Employing illegal foreign worker — Employed without valid work permit — Whether evidence adduced by prosecution to establish essential ingredients of charge sufficiently strong — Immigration Act 1959/1963 (Act 155) s 55B (1)

The appellant was charged under s 55B of the Immigration Act 1959/1963 for employing two female Indonesian illegal immigrants, Jessy and Doni, without a valid work permit. The two had been charged and convicted by the court for an offence of contravening the immigration laws. Both the accused persons had served the sentence and had since been deported. However, only Dory's deposition was recorded in court prior to her deportation. The learned sessions court judge however, held that the deposition of Dory was inadmissible, pursuant to s 40A(1) of the Act, because the prosecution did not adduce any evidence to show that there was an order for the removal of Dory from Malaysia made by the Director General of Immigration under ss 32, 33 and 56(2) of the Act. Hence, the court had ruled that the prosecution had not established a prima facie case. Against the said decision, the appellant appealed to this court.

Held, allowing appellant's appeal:

Section 40A(1) of the Act per se did not prohibit any deposition lawfully made relating to an offence to be introduced in court as evidence. The decision of the learned sessions court judge pertaining to the admissibility of the deposition that could only be done with an order for her removal from Malaysia made by the Director General of Immigration under ss 32, 33 and 56(2) of the IA 1959/63, is not a matter which is expressly stated in the Immigration Act 1959/63. Further, deposition may also be made admissible, pursuant to s 32 (i) and (j) of Evidence Act 1950 (see para 11).

[Bahasa Malaysia summary

Perayu didakwa di bawah s 55B Akta Imigresen 1959/1963 kerana menggaji dua pekerja wanita asing dari Indonesia, iaitu Jessy dan Doni, tanpa permit kerja yang sah. Kedua-dua mereka telah didakwa di mahkamah bagi kesalahan melanggar undang-undang imigresen. Hukuman terhadap mereka telah dilaksanakan dan mereka telah dihantar pulang. Walau bagaimanapun, hanya deposisi Dory telah dicatat di mahkamah sebelum penghantaran pulang. Walaupun demikian, hakim mahkamah sesyen telah memutuskan bahawa deposisi Dory tidak boleh diterima pakai mengikut peruntukan s 40A(1) Akta tersebut kerana pihak pendakwa telah gagal mengemukakan keterangaan menunjukkan bahawa terdapatnya perintah daripada Pengarah Kanan Imigresen bagi penghantaran pulang Dory di bawah ss 32, 33 dan 56(2) Akta tersebut. Oleh itu, mahkamah memutuskan bahawa pendakwa telah gagal membuktikan kes prima facie. Perayu telah merayu kepada mahkamah ini terhadap keputusan tersebut.

Diputuskan, membenarkan rayuan perayu:

Seksyen 40A(1) Akta tersebut dengan sendirinya (per se) tidak menghalang sebarang deposisi yang dibuat secara sah berkaitan kesalahan untuk dikemukakan di mahkamah sebagai keterangaan. Keputusan hakim mahkamah sesyen sama ada deposisi yang dinyatakan di atas boleh diterima pakai sebelum perintah penghantaran pulang dari Malaysia dibuat oleh Ketua Pengarah Imigresen di bawah ss 32, 33 dan 56(2) Akta Imigresen 1959/63, bukanlah suatu perkara yang disebut secara khusus di bawah Akta tersebut. Selain dari itu, deposisi juga boleh diterima pakai di bawah s 32(i) dan (j) Akta Keterangaan 1950 (lihat perenggan 11).]

Notes

For cases on absent witness, see 7(1) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 1085–1086.

For cases on employing illegal foreign worker generally, see 7(2) *Mallal's Digest* (4th Ed, 2006 Reissue) paras 3975–3977.

Cases referred to

PP v Lam Peng Hoa & Anor [1996] 5 MLJ 405 (refd)
PP v Michael Anayo Akabogu [1995] 3 MLJ 42 (refd)
PP v Mohd Aszzid Abdullah CRA–41–20 of 2006-II [unreported] (refd)
PP v Mohd Jamil bin Yahya & Anor [1993] 3 MLJ 702 (refd)
R v O'Loughlin & Anor [1988] 3 All ER 431 (refd)
S Subramaniam a/l Shanmugam v PP [2002] 7 MLJ 155 (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212 (refd)

Legislation referred to

Evidence Act 1950 s 32 (i), (j), 114(g)
Immigration Act 1959/1963 ss s 6(1)(c), 32, 33, 40A(1), 55B, 56(2)
Immigration Regulations 1963 rr 8, 39(b)

Steve Ritikos (Deputy Public Prosecutor) for the appellant.
Anthony Tai (Anthony Tai Advocates) for the respondent/accused.

Hamid Sultan JC:

[1] This is my judgment in respect of the appellant's appeal against the decision of the learned sessions court judge who had ruled that the prosecution has not established a prima facie case.

[2] The appellant was charged as follows:

> That you, on the 17 day of November 2005, at about 9.30pm, at GOLD STAR SNOOKERIUM No 318 & 319, 1st Floor, Section KTLD, Jalan Rubber, in the District of Kuching, in the State of Sarawak, was found employing one Indonesian Female namely DONY (F) 18 years old who was without any valid working permit and you thereby committed an offence punishable under s 55B of the Immigration Act 1959/1973 (Amended 2002).

[3] Section 55B(1) of the Immigration Act 1959/1963 (Act 155) (IA 1959/63) reads as follows:

> Any person who employs one or more persons, other than a citizen or a holder of an entry permit, who is not in possession of a valid pass shall be guilty of an offence and shall, on conviction, be liable to a fine of not less than ten thousand ringgit but not more than fifty thousand ringgit or imprisonment for a term not exceeding twelve months or to both for each such employee.

[4] The brief facts of the case relating to the charge can be garnered from the evidence of PW1 (Chief Inspector Mohammad Yarshar Abdullah) and the notes of evidence reads as follows:

> PW1:
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> On 17 November 2005 I was in Kuching. That day at about 9.30pm. I and a team of police from CID IPK Sarawak led by Chief Inspector Jailani conducted a raid and inspection at Gold Star Snookerium at 318 and 319 First Party, Section KTLD, Jalan Rubber, Kuching. When our team arrived at the Snookerium centre I saw many people playing snooker and a group of people were gambling Hoo Hey How or Holo. When I did inspection at the counter I found a female who was an Indonesian national by the name of Jessy working as a cashier. Also I found another female later known as Doni who was working as a waitress in the snookerium centre. After I asked them to show personal identification documents the female by the name of Jessy took out a Pass Lintas Batas whereas Doni failed to produce any valid travel document. I informed them of their offence. To Jessy I informed her that I was arresting her under s 51(3) (9A) Immigration Act and that I detained her under s 51(5)(b) of the same Act for contravening s 39(b) of the Immigration Act. As for Doni, I arrested her under s 6(1)(c) of the Immigration Act. Afterwards I asked both the females as to who managed the Snookerium Centre and both of them pointed to a Chinese man later known as Sim Kay Chay. At that time he was near the counter. I called Sim Kay Chay to come over

to see me. I informed him of his offence and I arrested him under s 56(1)(d) of the Immigration Act for harbouring a foreign national. Sim Kay Chai is in the accused dock …

After I made the arrests my team and I brought the three arrestees back to the CID to make a report. I lodged a report. The report now shown to me is the report that I lodged. The report was made at Satok Police Station on 17 November 2005 at 10pm I read the contents of the report. …

[5] The next material witness to this case was the investigating officer, PW2 and his evidence in the notes of proceedings reads as follows:

PW2:

I received the report made on 17 November 2005 lodged by Chief Inspector Mohd Yahsar Abdullah regarding the arrests of two Indonesian females and the owner of the Snookerium Centre. … After I received this report I informed my superior at CID. The two female illegal immigrants are Jessy and Doni. What I know is that Jessy is an Indonesian national and she worked at the Snooker Centre. She possessed a Border Pass at the time of arrest. The other female was also Indonesian by the name of Doni. She also worked at the Snooker Centre and did not have any valid travel documents with her when she was arrested. The two female Indonesians have committed an offence. They were charged in court. Jessy committed an offence of contravening the conditions of her Border Pass.

The offence is under r 39(b) Immigration Regulations. Jessy was charged in court. She was convicted. Jessy has now returned to her country. Her deposition was not recorded. This is because she was deported before her deposition could be recorded. Doni was charged in court under s 6(1) (c) Immigration Act. She was convicted. After that I made application for her deposition to be recorded. I made the application to the court. I made the application on the 15 February 2006. The deposition was recorded from the witness. It was recorded on the 9 March 2006. The deposition was recorded in court. Magistrate Puan Dayang Eileen recorded it. The witness was brought from prisons to court. I was present when the witness was brought to court. After the deposition was recorded the witness was brought back to the prisons. I was present when the deposition was recorded. I was not given a copy of the deposition. The witness whose deposition was recorded is by the name of Doni. Doni had been deported back to her country …

Sim Kim Chay is the owner of the place where the two witnesses worked. The place is Gold Star Snookerium, Jalan Rubber, Kuching. I have checked as to who is the owner of Gold Star Snookerium and the owner is Sim Kim chay. His name is stated in the licence of the Gold Star Snookerium …

[6] The other material witness to this case is the registrar of the subordinate courts, PW3 and his evidence in the notes of proceedings reads as follows:

My job is in charge of the Registry of the Subordinate Courts Kuching including administrative work. Magistrate Puan Dayang recorded a deposition in March 2006 and that deposition is in my custody. The deposition was in my custody since 9 March 2006 after the Magistrate took the deposition and it was handed to me. I have the original copy of the deposition with me. I now produce it.

PO: Tender the deposition.

Mr Anthony Tai: In respect of its admissibility I have an objection. Although there is provision to provide for its admissibility I urge whether this court has discretion under the common law not to admit it on the grounds it contravenes the basic principle of any trial namely the right of the accused to have a fair trial. This concept of fair trial includes the absolute right of the accused to cross-examine any witness who testifies against him. This principle is even more important in our case where the only evidence against my client consist of the evidence of this particular witness Doni ak Dio. I would urge the Court to consider the fact that according to s 40 of the Immigration Act once the deposition is admitted it shall constitute prima facie evidence of the case against my client. I urge the court to consider the interest of justice.

PO: Under the Immigration law the deposition of the witness is allowed to be recorded under s 40A Immigration Act in the presence or absence of the person charged. I think we have complied with the requirements of the law.

Court: With regard to the admissibility of the deposition we have a situation where the Magistrate has taken down the deposition pursuant to s 40A. In deed the Magistrate would be obliged to take down the deposition once a person is brought before the magistrate under s 40A. The deposition taken is admissible. The weight to be given to it is another matter and I think that essentially is the line of objection of the defence. The defence is entitled to comment on the weight to be given to the deposition but I do not think there can be any question of it being admissible.

Court: Deposition is marked exh P3.

[7] It is crucial to note that the learned sessions judge in her judgment had reconsidered the admission of the deposition of Dony (f), the person whom the accused has been alleged to have employed which was marked as exh P3, as inadmissible on the following grounds:

… Section 40A (1) of the Act, in particular the words of the section that I have emphasized in italics above, it is quite clear that before any deposition made by the person named Dony in the charge can be admissible in evidence, there must have been an order for her removal from Malaysia made by the Director General of Immigration under ss 32, 33 and 56(2) of the Act. The prosecution did not adduce any evidence to show that there was such an order for removal from Malaysia made by the Director General of Immigration in respect of Dony. All we have in the evidence is the testimony of PW2 who testified that Dony was charged in court under s 6(1)(c) of the Immigration Act and was deported. PW2 did not give the particulars of the conviction and did not testify as to how and when the deportation was made. More importantly, there is no evidence that an order for the removal of Dony was made by the Director General of Immigration. As such, the prerequisite under s 40A of the Immigration Act 1959/1963 (Act 155) that there must be an order for removal by the Director General is not proved to have been met or done. Therefore, Dony's deposition, although taken by the Magistrate, is not admissible as evidence. And although the said deposition was tendered and marked as an exhibit for the prosecution, the court cannot consider its contents as it was inadmissible in the first place.

With the deposition out of the way, what was left of the evidence for the prosecution?

[8] The learned counsel for the accused has filed before the sessions court, a written submission of no case to answer and that submission, inter alia, reads as follows:

Submit that there is no prima facie case:

(a) Charge disclosed no offence known to law

there is no provision under the law that a foreigner working in Malaysia or Sarawak must have a working permit.

the term working permit is not provided for in the Immigration Act 1959/63 or the Immigration Regulations 1963.

Refer to s 8 of Immigration Regulations 1963 and in particular 8(a) which contains the term Employment Pas or Work Pass.

Employment Pass is provided for under s 9 of Immigration Act 1963 and is applicable to foreigners who enter the country to take up employment under a contract of service with the Government of the Federation or of any State in the Federation or of any city Council or Municipality in the Federation or to take up employment in the Federation under a contract subject to (a) and (b).

Submit: It is apparent that this employment pass is not applicable to the circumstances of this case. Work pass under s 16 of the Immigration Regulations 1963 is applicable only to Sabah and not Sarawak.

Submit: There is no provision in the Immigration Act 1959/63 or the Immigration Regulation Act 1963 which requires a foreigner working in Sarawak to have a work permit.

Submit: No an offence to employ persons without a working permit because the law does not require a working permit. The law requires an employment pass as provided for under s 9 of the Immigration Regulation 1963 [subject to the conditions contained therein].

Employment pass is not relevant in our case.

Submit: The offence charged is not known to law.

Submit: The accused must be discharged and acquitted of the charge without calling for his defence.

(b) There is no evidence that the accused is the owner of Gold Star Snookerium because the registration certificate of the firm was never produced to prove this ingredient. Such evidence was available but not produced and therefore the court should invoke an adverse inference under s 114(g) Evidence Act 1950. (c) (d)

(c) There is no proper identification of the accused who is alleged to be the person employing the Indonesian maid.

(d) The deposition of Dony Ak Dio[f] tendered in evidence as (exh 3) and admitted into evidence under s 40A of the Immigration Act 1959/63 has no weight and evidential value.

(i) The court does not have the benefit of seeing the deponent.

(ii) The court does not have the benefit of hearing her evidence tested in cross-examination.

(iii) The prejudiced effect of (exh 3) outweighs its probative effect.

(iv) The accused would be denied a fair trial and would be deprived the right to cross-examine the deponent.

(v) The use of (exh 3) would be likely to produce injustice of a kind inconsistent with a fair trial.

(vi) Since there is no cross-examination the court is in no position to decide whether the depositions and statement was true and accurate with result that the trial would be unfair and a travesty.

Submit: That it is the duty of the court to ensure that the accused receives a fair trial. It is unlikely to provide the accused with a fair trial unless it exercised caution to consider evidence adduced as in (exh 3) where a heavily prejudicial statement (which cannot be challenged by cross-examination) was admitted.

Instructive English case

(1) *R v O'Loughlin & Anor* [1988] 3 All ER 431;

(2) *Richard Scott & Anor v The Queen Winston Barnes & Ors v The Queen* (Weekly Law Reports 19 May 1989) p 246.

Submit: The accused must be discharged and acquitted without his defence being called.

[9] The appellant's submission can be summarised as follows:

(a) The learned SCJ erred in law and in fact (i) when in the first instance she ruled that exh P3 was admissible and later as inadmissible after it had been marked as an exhibit, quoting the reason that it did not comply with s 40A(1) of the IA 1959/63. (ii) when she held that the prosecution did not adduce any evidence of the removal order of Dony, particulars of conviction of Dony and as to how and when the deportation was made, whereas there is no necessity for the above in the provisions of the law. (iii) when she failed to amend the charge accordingly as to the evidences adduced by the prosecution. (iv) when she failed to appreciate the fact that the evidence of the prosecution witnesses was never challenged. (v) when she failed to appreciate the evidence that the accused was the person who was harbouring and was rightly charged.

(b) On grounds (i) and (ii), the learned sessions court judge erred when she said 'it is quite clear that before any deposition made by the person named Dony in the charge can be admissible in evidence, there must have been an order for her removal from Malaysia made by the Director General of Immigration under ss 32, 33 and 56(2) of the Act. The prosecution did not adduce any evidence to show that there was such an order for removal from Malaysia made by the Director General of Immigration in respect of Dony. All we have in the evidence is the testimony of PW2 who testified that Dony was charged in court under s 6(1)(c) of the Immigration Act and was deported'. There is no requirement that the prosecution must prove that there was an order for removal by the Director General of Immigration, before the said deposition can be admitted as evidence. In this respect, the appellant refers to s 40A(1) of the IA 1959/63 which states:

> Notwithstanding anything contained in this Act and any written law to the contrary, where in any proceeding for any offence under this Act a testimony of any person in respect of whom an order for removal from Malaysia has been made by the Director

> General under s 32, 33 and 56(2) is *required by the court*, there *shall be admissible in evidence* before that court *any deposition* relating to the subject matter of that proceeding made by that person … (Emphasised added.)

The words 'is required by the court' means that before the court proceeds to take any deposition from the deponent (ie, the said Doni in this case), the court must be satisfied that an order for removal by the Director General has been made. Once the court is satisfied that an order has been made, the court can then proceed to record the deposition. In this case, once the deposition has been recorded and taken, it means that the court is satisfied that an order for removal has been made. The court may then proceed with the recording of the deposition. Therefore, once the deposition has been recorded, the said deposition (in this case, exh P3) 'shall be admissible in evidence' relating to the subject matter of that proceeding. In the trial before the learned sessions court judge, there is no necessity for the prosecution to again prove that an order for removal by the Director General has been made since before the deposition was recorded, the court taking the deposition must be satisfied that the said order has been made by the Director General. By taking such deposition, the court must have been satisfied that there was an order for removal by the Director General.

(c) On ground (iii), when the learned sessions court judge found that there was sufficient evidence to show that a visit pass for temporary employment had been proved, then the learned sessions court judge should have amended the charge. In *S Subramaniam a/l Shanmugam v Public Prosecutor* [2002] 7 MLJ 155 (HC), it was stated at p 171:

> Section 158 of the CPC, which has been reproduced earlier, clearly provides the court may at any time before judgment is pronounced alter or add to any charge. But according to Hashim J in *Public Prosecutor v Tan Kim Kang & Ors* [1962] 28 MLJ 388, it is a course which should be adopted only with great caution. The learned judge said (at p 389):
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> > I would like to comment on the powers of the Court under s 158 of the Criminal Procedure Code. Section 158 of the Criminal Procedure Code empowers a Court to 'alter or add to any charge at any time before judgment is pronounced'. It is permissible under that section to alter the charge after the defence has been called but it is a course which should be adopted only with great caution. I think a safer and better course would be to follow the provisions of s 173(h), (i) and (j) of the Criminal Procedure Code. It is quite clear from these 3 sub-sections that a president or a magistrate should make any alteration or amendment to the charge only at the close of the case for the prosecution.

(d) on ground (iv) the following facts were not challenged by the defence in cross-examination; namely (i) the evidence of PW1, which include, (a) that the said Doni was arrested for an offence under s 6(1)(c) of the Immigration Act; (b) that both the women (Jessy and Doni) pointed to the accused when asked to indicate the person who managed the Snookerium Centre; (c) that Doni was working as a waitress in the Snookerium Centre. (ii) the evidence of PW2 (the Investigating Officer), namely: (a) that Doni was charged under s 6(1)(c) of the IA 1959/63 and was convicted. (b) that an application was made for her deposition to be made. (c) that Doni was deported to her country. (d) that the

A accused was the owner of the Snookerium where Jessy and Doni worked; (e) that upon checking as to who the owner of the Snookerium was, the owner was found to be the accused. (f) that the accused's name appeared in the licence of the (Goldstar) Snookerium.

(e) it is trite law that where one party fails to cross-examine any witness on any B material fact or issue, that fact shall be taken as the truth and an acceptance of the witness's testimony. In *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212, it was stated (at p 213):

> … there is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness's testimony …

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(f) on ground (v), the appellant says that the learned sessions court judge was wrong when she found that the prosecution failed to prove that it was the accused person who employed the two females (including the said Doni) when it was in the deposition of Doni that her 'towkey' was the accused whom she called 'Kin Chey'. Further, it was also the evidence of PW2 that the owner of D the said snookerium was the accused. It is therefore wrong when the learned sessions court judge said:

> they did not say that the accused was the person employed by them which is the offence specified in s 55B(1) of the Immigration Act and them asserting that the E accused was managing the snooker centre in my view is not tantamount to saying that the accused was the person who employed them.

The unrebutted evidence reveals that the accused was the owner of the snooker center and that the two females worked in the snooker centre. It was also in the deposition that the accused was the 'towkey' to the two females. The fact that F the accused was the owner of the snooker center (as evidenced) clearly showed that he employed the two females. It was wrong for the learned sessions court judge to merely confine herself as to the word used by PW1, ie, 'managed' the snookerium, without considering the additional unrebutted fact that the owner of the snookerium was the accused himself.

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[10] The respondent's submission in essence bears similar effect to that submitted before the sessions court. On ground three of the appeal, the respondent says that the order of acquittal was correct in that the evidence adduced by the prosecution did not establish the essential ingredient of employment. On ground four, the respondent H says that this ground is misconceived, frivolous and completely irrelevant as there was no sentence imposed by the sessions court and as such there was no sentence to be varied and or subsisted.

[11] Before, I can decide whether there is a prima facie case, it is crucial for me to I decide whether exh P3 is admissible. From the reading of s 40A(1) of the IA 1959/63, I take the view that the section per se does not prohibit any deposition lawfully made relating to an offence to be introduced in court as evidence. The learned sessions judge's decision that before the deposition can be admissible in evidence there must have been an order for her removal from Malaysia made by the Director General of Immigration under ss 32, 33 of 56(2) of the IA 1959/63, is not a matter which is

expressly stated in the IA 1959/63. On the contrary, what it means is that if there has been an order made, such a testimony can be introduced in evidence through any of the relevant prosecution's witnesses, for example, the investigation officer (IO). Since there was no evidence of the order, the prosecution has rightly called the registrar to introduce the document which was in custody. Thus, the said document is admissible. Further, exh P3 may also be made admissible, pursuant to ss 32(i) and (j) of Evidence Act 1950 ('EA 1950'). Section 32 deals with statements of persons who cannot be called as witnesses, on the ground that: (a) they are dead; (b) they cannot be found; (c) they have become incapable of giving evidence; (d) their attendance cannot be procured without an amount of delay or expense which under the circumstances of the case, appears to the court unreasonable. This section previously contained 8 exceptions to the hearsay rule. Under the 1993 Amendment (A851) of the EA 1950 s 32(i) and (j) have been included which are only applicable in criminal proceedings. The statements which are to be admitted should have been made under the particular circumstances stated in section before they are made relevant under s 5 of the EA 1950. Before admitting any piece of evidence on the grounds stated above, the fact must be proved strictly and the court must be fully satisfied. The provision of s 32(1)(i) and (j) was considered by the court in the case of *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702, where KC Vohrah J (as he then was) observed at p 708:

> In respect of paras (a)–(h), of s 32(1), they are in pari materia with paras (1)–(8) of s 32 of the Indian Evidence Act and the principle for having the original eight exceptions to the hearsay rule is explained in *Sarkar on Evidence* (1990, Reprint) at p 370, quoting from *Wigmore* (ss 1420–1422):
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> > The purpose and reason of the hearsay rule is the key to the exceptions to it. The theory of the hearsay rule is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination. But this test or security may in a given instance be superfluous: it may be sufficiently clear, in that instance, that the statement offered is free from the risk, of inaccuracy and untrustworthiness so that the test of' cross-examination would be a work of supererogation. Moreover, the test may be impossible of employment - for example, by reason of the death of the declarant, so that, if his testimony is to be used at all, there is a necessity for taking it in the untested shape. A perception of these two principles (a necessity for the evidence and a circumstantial probability of trustworthiness) and their combined value has been responsible for most of the hearsay exceptions.
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> > To be noted too, is that the principle of impeaching and discrediting or corroborating the declarant of a dying declaration is recognised by a statutory provision and in fact extends to all declarants of statements made admissible under ss 32 and 33 of the Evidence Act 1950 as s 158 of the Evidence Act 1950 provides that 'whenever any statement relevant under ss 32 or 33 is proved, all matters may be proved either in order to contradict or to corroborate it, or in order to impeach or confirm the credit of the person by whom it was made, which might have been proved if that person had been called as a witness and had denied upon cross-examination the truth of the matter suggested.' In my view, the weight and degree of credit to be attached to a statement by a declarant under para (i) who is patently not disinterested must be examined with the greatest of caution lest false stories or a false colouring to the stories given by the declarant in the statement makes the court draw a 'jaundiced view of facts which cannot be verified through the

> cross-examination of the declarant and facts which may falsely implicate an accused. And more so where an accused faces a charge carrying a mandatory sentence of death on conviction on the charge.

[12] In *Public Prosecutor v Lam Peng Hoa & Anor* [1996] 5 MLJ 405, Kang Hwee Gee J was of the view that s 32(1)(i) and (j) of the EA 1950 should be read disjunctively. The word 'and' which joins sub-s (i) and (j) could admit of no more significance than an exposition of the draftsman's preference of a conjunction as an ending to all the provisions in sub-s (1) of s 32. Further the learned judge said that it is clear that the language used in s 32(1)(i) and (j) is so plain that it is hardly necessary to embark on the task of interpretation.

[13] Whether s 32(1)(i) and (j) must be read conjunctively or disjunctively is a matter of controversy and cases have been decided in both ways [*Public Prosecutor v Michael Anayo Akabogu* [1995] 3 MLJ 42; *Public Prosecutor v Mohd Jamil bin Yahya & Anor* [1993] 3 MLJ 702; *Public Prosecutor v Lam Peng Hoa & Anor* [1996] 5 MLJ 405]. If it is read conjunctively, then the new provision is only limited to the statements made by public officers. On the other hand, if it is read disjunctively, then it relates to a wide variety of statements. Jeffrey Tan JC (as he then was) stated in *Public Prosecutor v Michael Anayo Akabogu* that it is trite that any ambiguity in the language of provisions leading to proof in criminal proceedings, such as s 32(1)(i) and (j), is to be narrowly construed.

[14] As there was no submission on this section I think it will not be appropriate for me to deal with the said section for the purpose of this appeal.

[15] The second issue in this case relates to the word 'work permit' and the learned sessions judge says there is no issue of 'work permit' but only 'valid pass'. That part of the judgment reads as follows:

> Clearly the offence created under s 55B(1) is that of employing a person who is not in possession of a valid pass. However, the charge framed against the accused cites that he employed a person who is not in possession of a valid work permit. This is manifestly wrong.
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> If, however, a work permit can be said to be a pass then the charge would be correct. Section 2 of the Act defines 'Pass' to mean 'any pass issued under any regulations made under this Act entitling the holder thereof to enter and remain temporarily in Malaysia'. Regulation 8 of the Immigration Regulations 1963 specifies the classes of passes that may be issued for the purpose of entitling a person to enter and remain temporarily in Malaysia or within Sabah or Sarawak. The classes of passes are:
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> (a) an Employment Pass or Work Pass (in the case of Sabah);
> (b) a Dependant's Pass;
> (c) a Visit Pass;
> (d) a Transit Pass;
> (e) a Student's Pass;

(f) a Special Pass and;

(g) a Landing Pass.

None of the classes specified in r 8 is defined to comprise a work permit. Regulation 11, however, calls for special mention. This is because it allows for a Visit Pass to be issued to any person other than a prohibited immigrant who satisfies the controller that he wishes to enter the Federation for temporary employment. Hence, it would appear that by r 11, there is such a thing as a Visit Pass for temporary employment. However, whether a Visit Pass for temporary employment is the same as a work permit is not clear. In any case, that they are the same thing is not established either by the prosecution or the definitions given in the Act or Regulations. As such, I agree with the submission of defence counsel that the charge discloses no offence known to law.

The last element of the offence is that the person employed was not in possession of a valid Pass. As already mentioned the unchallenged evidence of PW1 is that Dony could not produce any valid travel document. If she could not produce any valid travel document she would not have been in possession of a valid pass because a pass would have been endorsed in the travel document. In addition PW2 testified that Dony was charged under s 6(1)(c) of the Immigration Act 1959/1963 (Act 155) and was convicted and deported back to Indonesia. His evidence was not challenged. He as well was not cross-examined. The offence under s 6(1)(c) applies to non-citizens of Malaysia entering Malaysia when not in possession of a valid Pass issued to him. In my view there was sufficient credible evidence that Dony was not in possession of a valid Pass when she was found working at the snooker centre.

In our instant case, the evidence adduced by the prosecution to establish the essential ingredient that the accused did in fact employ Dony was not sufficiently strong. All that the prosecution had on this essential ingredient of the offence is that Dony and Jessy had asserted that the accused was the person who managed the snooker centre. As previously mentioned the assertion admits of more than one inference and the more favourable must be construed in favour of the accused. Apart from this assertion there was nothing from the prosecution to establish that the accused had employed Dony. My finding therefore was that the prosecution had failed to establish that the accused had employed this female by the name of Dony. In view that the prosecution had not proved all the essential ingredients of the offence under s 55B (1) of the Immigration Act 1959/1963 (Act 155), no prima facie case can be said to have been made out.

If, despite the wrong charge, the prosecution had been able to prove all the ingredients of the offence under s 55B(1) of the Act I would have been duty bound to amend the charge accordingly when the prosecution closed its case. As we have seen, the prosecution did not prove its case under s 55B (1) to the required standard. An amendment of the charge was therefore out of the question.

For the reasons given above the accused was discharged and acquitted of the offence charged.

[16] In my view, the learned sessions judge erred in law in failing to amend the charge to reflect a 'valid pass' as opposed to work permit when there was a conclusion in the following words *In my view there was sufficient credible evidence that Dony was not in possession of a valid pass when she was found working at the snooker centre.*

[17] I have read the appeal record and the submission of the parties in detail. On the law in respect of prima facie case, I have dealt in detail in the case of CRA–41–20 of 2006–II *Public Prosecutor v Mohd Aszzid Abdullah* where the judgment was delivered on 18 June 2007 and the relevant part reads as follows:

(10) As the crux of the issue related to this appeal materially depends on the question of prima facie case, in my view to appreciate and understand this concept in the right perspective, it is essential to read the relevant provisions of the CPC with EA 1950. In almost all the cases which dealt with the issue relating to prima facie case, the courts did not deal with the EA 1950 and in my view much confusion has been caused, before the decision of the Federal Court in *Balachandran*.

(11) A prima facie case materially consists of more than two concepts related to EA 1950. They are issues relating to standard of proof [see s 101 to 103 EA 1950] and weight of evidence or also referred to as probative value or probative force [see s 3 of EA 1950]. A prima facie case cannot be equated to burden of proof alone. Further, a prima facie case cannot be equated to the concept of maximum evaluation of evidence only. However, to define a prima facie case, the element relating to the standard of proof and weight of evidence becomes inextricably interwoven. The phrase maximum evaluation or minimum evaluation or credible evidence is not a term of art used in common law jurisprudence in the law relating to evidence. The nearest equivalent to this term in the law of evidence will be in my view, weight of evidence or probative value etc. Further maximum or minimum evaluation or credible evidence does not relate to standard of proof. Because these terminologies, when they first appeared in Malaysian cases, were not explained within the regime of EA 1950, they may in my view have lead to much confusion and this is reflected in the submission of the prosecution, as the prosecution had relied on the following cases namely: (i) *Munusamy v PP* [1987] 1 MLJ 492 (ii) *Dalip Bhagwan Singh v PP* [1998] 1 MLJ 1 (iii) *PP v Tan Sri Muhammad bin Muhammad Taib* [1999] 2 MLJ 305 (iv) *PP v Saare Hama & Anor* [2001] 4 CLJ 380; [2001] 4 MLJ 480; (v) *Looi Kow Chai & Anor v PP* [2003] 1 CLJ 734; [2003] 2 MLJ 65; (vi) *Arulpragasan Sandaraju v PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1; (vii) *Hwa Tua Tau v PP* [1981] 1 CLJ 123 (viii) *Tan Chai Keh v PP* [1948 – 49] SUPP 105 (ix) *PP v Kasmin Soeb* [1974] 1 MLJ 230 (x)*Khoo Hi Chiang v PP* [1994] 2 CLJ 151; [1994] 1 MLJ 265 SC (xi) *Dato' Mokhtar Hashim v PP* [1983] 1 CLJ 101; [1983] 2 MLJ 232; (xii) *PP v Krishna Rao a/l Gurumurthi* [2000] CLJ 446; [2000] 1 MLJ 274; (xiii) *PP v Dato' Seri Anwar Ibrahim (No 3)* [1999] 2 CLJ 215; [1999] 2 MLJ 1; (xiv) *PP v Sukumaran a/l Sudram* [1999] 4 MLJ 462; [1999] 4 CLJ 242; (xv) *PP v Ong Cheng Heong* [1998] 4 CLJ 209; [1998] 6 MLJ 678; (xv) *PP v Chin Yoke* [1940] MLJ 47 (xvi) *PP v Mohan Singh* [1999] 4 CLJ 620 (xvii) *Balachandran v PP* [2005] 1 CLJ 85; [2005] 2 MLJ 301.

(12) The word 'proof' means anything, which serves to convince the mind about the truth or falsehood of a proposition. Under s 3 of the EA 1950 a fact is said to be proved when after considering the matters before it, the court either: (a) believes it to exist; or (b) considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it does exist. The extent to which a particular piece of evidence aids to prove a fact in issue is called its probative force. It is necessary for the probative force to be sufficient to induce the court: (i) to believe in the existence of the fact; and/or (ii) to consider its existence so probable that a prudent man may act upon the supposition that it exists. The test whether a matter has been proved or not is objective in nature and the test is-would a prudent man, after considering the matters before him deem the fact in issue proved or disproved. The word 'disproved' is exactly the opposite of 'proved' and is defined again in s 3 of the EA 1950 to emphasise its importance. A fact is said to be disproved when, after considering the matter before it, the court either: (a) believes that it does not exist; or

(b) considers its non-existence so probable, that a prudent man ought under the circumstances of the particular case, to act upon the supposition that it does not exist. The term 'not proved' is explained in s 3 of the EA 1950. A fact is said to be not proved when: (a) it is neither proved; (b) nor disproved. When a fact has not been proved by the party on whom the burden lies, that is to say, when the said party has given no evidence or has given evidence, which is not sufficient to establish the fact, the fact is said to be not proved. There is a useful maxim: 'falsus in uno falsus in omnibus' which means if a thing is false in respect of one it must be taken to be false in respect of all [see *Nisar Ali v State of UP* AIR 1957 SC 366]. This maxim does not occupy the status of law in Malaysia. However, sometimes, counsels do argue that if a part of the evidence given by a witness has been disbelieved, the whole of it should also be disbelieved, as a rule of law. In my view, such line of argument may hold water now in this juncture, provided the judge is convinced at the prima facie stage that a prudent man ought to, under the circumstances of the particular case, act upon the supposition that it does not exist.

(13) When a person is bound to prove the existence or non-existence of any fact, then it is said that the burden of proof lies on that person. Burden of proof can be defined as the obligation, which is imposed on a party to adduce sufficient evidence in support of his vital contention to result in over all success by him in his case. This is sometimes referred to by some authors as burden of proof simpliciter or the persuasive burden or probative burden or the risk of non-persuasion or burden of proof on the pleadings or fixed burden of proof or ultimate burden etc. The relationship between 'fact in issue' and 'burden of proof' is that, facts in issue are vital issues central to the allegation of the party and failure by him to adduce sufficient evidence in support of a fact in issue means that he has failed to discharge the legal burden and thus he will fail in his over all contention. Thus, it can be said that proof of 'fact in issue' is the sine qua non for establishing legal burden. In deciding the 'fact in issue', maximum evaluation test as asserted by the Federal Court in *Balachandran* must be meticulously followed.

[18] I take the view for reasons stated above that the prosecution have established a prima facie case and in the circumstance of the case the charge should have been amended accordingly and the defence ought to have been called.

[19] For reasons stated above, the appeal is allowed with the following orders:

(i) The charge to be amended by the sessions court and the defence to be called.

(ii) The matter to be fixed for mention before the sessions court on 2 July 2007 for further orders in respect of the prosecution and defence to deal with the issue as to bail, and/or any directions which may be necessary for the purpose of the proceedings therein.

Appeal allowed.

Reported by Ashgar Ali Ali Mohamed